[Cite as *State v. Johnson*, 2015-Ohio-1373.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	Case No. 14CA10
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
STACEY C. JOHNSON,	:	
Defendant-Appellant.	:	**RELEASED: 04/03/2015**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Terrence K. Scott, Assistant State Public Defender, Columbus, Ohio, for appellant.

Colleen S. Williams, Meigs County Prosecuting Attorney, and Jeremy L. Fisher, Assistant Prosecuting Attorney, Pomeroy, Ohio, for appellee.[1]

Harsha, J.

{¶1} Stacey C. Johnson pleaded guilty to nonsupport of dependents, and the Meigs County Court of Common Pleas sentenced her to five years of community control. Subsequently, the state filed a motion to revoke Johnson's community control based on an allegation that Johnson had committed a theft offense. After a revocation hearing the trial court found that Johnson had violated the terms of her community control by committing theft, revoked her community control, and imposed a prison sentence of 12 months for her nonsupport conviction.

{¶2} On appeal Johnson asserts that the trial court abused its discretion because it revoked her community control in the absence of sufficient evidence. However, substantial proof, including her failure to pay for items, supported the trial court's determination that Johnson violated her community control by stealing items

[1] Although the state filed a brief, at best it provided minimal insight into the issues before us.

from a vendor's booth. Therefore, the trial court did not abuse its discretion in revoking her community control.

{¶3} Johnson also contends that the trial court violated Evid.R. 1002 by permitting the state to present testimony describing the content of a videotape of the theft without producing the actual tape. Because Johnson did not object to this evidence during the revocation proceeding she forfeited her claim, except for plain error. And she did not establish plain error because the Rules of Evidence are inapplicable to community control revocation proceedings. Moreover, the outcome of the revocation proceeding would not clearly have been otherwise if Johnson had objected to this testimony.

{¶4} Next Johnson argues that her trial counsel provided ineffective assistance of counsel by failing to object to the testimony about the videotape. However, her trial counsel was not ineffective in failing to raise an objection based on an evidentiary rule that was inapplicable to her revocation proceeding.

I. FACTS

{¶5} Upon being charged with two counts of nonsupport of dependents in violation of R.C. 2919.21(A)(2) and (B), a felony of the fifth degree, Stacey C. Johnson pleaded guilty to one of the counts in return for the dismissal of the remaining count. The trial court sentenced Johnson to five years of community control and notified Johnson that if she violated her community control, the court could impose the 12-month prison sentence.

{¶6} Three months later officials filed a criminal complaint charging Johnson with a misdemeanor offense of theft that occurred after her sentencing. Based upon that complaint the state filed a motion to revoke Johnson's community control and to impose a prison sentence. The motion was accompanied by a copy of the criminal complaint, as well as a statement by a vendor complaining about the theft. The trial court subsequently held a revocation hearing where Johnson was represented by counsel.

{¶7} At the hearing the state presented two witnesses. The first witness, Larry Tucker, testified that he served as Johnson's probation officer and that he became aware of her violation of community control based on the complaint alleging she committed theft. When Tucker talked to her Johnson admitted being at the place of the alleged theft on the pertinent day, but she denied stealing anything.

{¶8} Deputy Sheriff Adam Smith testified that he received a report of a theft from a vendor who owned a booth at Alligator Jack's, a mall-type building that includes booths for about 40 different vendors. Customers buy items from the individual vendors and then carry their purchases around the building with them while they either continue to shop or leave. The complaining vendor gave Sgt. Smith a copy of still pictures and a videotape from surveillance cameras he had for his booth. From the evidence he received, Sgt. Smith identified Johnson and Timmy Frederick stealing items from the booth on May 24, 2014.

{¶9} Sgt. Smith reviewed the videotape and testified that: (1) the videotape did not include any audio; (2) Johnson and Frederick were in the booth for about 10 minutes; (3) while in the booth, Johnson and Frederick sat and talked while Frederick

opened up boxes and moved parts from one socket set to another; (4) Johnson turned to go back out to see if anyone was walking into the booth and Frederick put items in his pockets; (5) they went to the back of the booth and Frederick opened boxes containing wrenches; (6) Johnson walked out of the booth carrying items without paying for them, and Frederick followed her, with items concealed in the pockets of his overalls; (7) Johnson carried the items she had taken in her hand, but was stopped about 30 feet from the front door by the booth owner, who forced her to return to his booth to pay for the items; and (8) Johnson and Frederick came into the building and booth together and they left together. Sgt. Smith testified that he later arrested Frederick and recovered one of the stolen wrench sets from him.

{¶10} The state did not introduce the videotape or photographs into evidence, and Johnson's counsel did not object to Sgt. Smith's testimony about their contents. Instead, she vigorously cross-examined him.

{¶11} The trial court determined that Johnson had violated the terms of her community control sanction by committing the theft, revoked her community control, and sentenced her to 12 months in prison.

II. ASSIGNMENTS OF ERROR

{¶12} Johnson assigns the following errors for our review:

1. The trial court abused its discretion when, in the absence of sufficient evidence, the trial court revoked Ms. Johnson's community control. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

2. The trial court erred by permitting the State to present, at the revocation hearing, evidence about the content of a videotape without producing the videotape. Fifth and Fourteenth Amendments to the United States Constitution; Evid.R. 1002, Evid.R. 1004.

3. Trial Counsel provided ineffective assistance of counsel by failing to object to Sgt. Smith's testimony regarding a videotape that was not produced during the probable cause hearing. Sixth and Fourteenth Amendments, United States Constitution, and Section 10, Article I, Ohio Constitution.

III. LAW AND ANALYSIS

A. Sufficiency of Evidence to Support Revocation

{¶13} In her first assignment of error Johnson asserts that the trial court erred in revoking her community control because there was insufficient evidence to support the court's finding that she violated the terms of her sanction. Although Johnson frames her assignment under an abuse-of-discretion standard, we have applied a two-part standard in similar cases:

> Because a community control revocation hearing is not a criminal trial, the State does not have to establish a violation with proof beyond a reasonable doubt. *State v. Wolfson*, Lawrence App. No. 03CA25, 2004–Ohio–2750, ¶ 7, citing *State v. Payne*, Warren App. No. CA2001–09–081, 2002–Ohio–1916, in turn citing *State v. Hylton* (1991), 75 Ohio App.3d 778, 782, 600 N.E.2d 821. Instead, the prosecution must present "substantial" proof that a defendant violated the terms of his community control sanctions. *Wolfson*, citing *Hylton* at 782, 600 N.E.2d 821. Accordingly, we apply the "some competent, credible evidence" standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, to determine whether a court's finding that a defendant violated the terms of his community control sanction is supported by the evidence. *Wolfson* at ¶ 7, citing *State v. Umphries* (July 9, 1998), Pickaway App. No. 97CA45; *State v. Puckett* (Nov. 12, 1996), Athens App. No. 96CA1712. This highly deferential standard is akin to a preponderance of the evidence burden of proof. *Wolfson*, citing *State v. Kehoe* (May 18, 1994), Medina App. No. 2284–M. * * * Thus, we conclude the appropriate review in this matter is twofold. First, we review the record to determine whether there is substantial evidence to support the court's finding that C.M.C. violated the terms of probation or community control. If it does, then we review the court's ultimate decision to revoke probation, i.e., the sanction, under the more deferential abuse of discretion standard.

In the Matter of C.M.C., 4th Dist. Washington No. 09CA15, 2009-Ohio-4223, ¶ 17.

{¶14} There was competent, credible evidence to support the trial court's determination that Johnson stole items from the vendor's booth. Johnson admitted to

her probation officer that she was at the building on the date of the charged theft. Sgt. Smith testified that based on the evidence provided to him by the booth vendor from his surveillance cameras, Johnson and Frederick entered the booth together; Johnson was next to Frederick when he began to take tools out of boxes and sets and rearrange them; Johnson appeared to act as a lookout when Frederick put items in his pockets; Johnson took items without paying for them; and Johnson paid for the items she took only after being confronted by the vendor when she left the booth and was 30 feet from the exit. Sgt. Smith later arrested Frederick and retrieved some of the stolen merchandise from him.

{¶15} This evidence supported a finding that Johnson stole items herself. R.C. 2913.02(A)(1) defines theft: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** [w]ithout the consent of the owner or person authorized to give consent." Johnson removed them from the booth without paying for them. In fact she did not offer to pay for the items until after she was confronted in a common area by the vendor. From this direct and circumstantial evidence it was reasonable to infer Johnson had no intent to pay for them when she left the booth. By then her unauthorized exercise of dominion and control over the items was complete. As the trier of fact, the weight to be given the evidence and the credibility of the witnesses were for the trial court to determine. *See State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 180, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *see also State v. Morgan*, 2d Dist. Montgomery No. 26132, 2014-Ohio-5071, ¶

15 (appellate court reviewing a trial court decision revoking community control defers to the trial court's determination on credibility of testimony).

{¶16} In her appellate brief, Johnson emphasizes two facts: 1) she paid for the item(s) before she left the mall and 2) the theft charge against her was ultimately dismissed. We addressed the first contention above. And community control, probation, and parole can be revoked, even if the underlying criminal charges are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed. *See Barnett v. Ohio Adult Parole Auth.*, 81 Ohio St.3d 385, 387, 692 N.E.2d 135 (1998); *State v. McCants*, 1st Dist. Hamilton No. C-120725, 2013-Ohio-2646, ¶ 9. The evidence admitted at Johnson's revocation hearing established that dismissal of her underlying charge of theft did not remove all factual support for the trial court's finding that she violated her community control. Therefore, the trial court's determination that Johnson violated her community control was supported by substantial proof that she committed theft.

{¶17} Likewise, the trial court did not abuse its discretion in revoking her community control. *See State ex rel. Simpson v. State Teachers Retirement Bd.*, __ Ohio St.3d __, 2015-Ohio-149, __ N.E.3d __, ¶ 19 (an abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable); *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, citing *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14 (an abuse of discretion includes a situation in which the trial court did not engage in a sound reasoning process). The trial court's revocation was based on a sound reasoning process—Johnson committed the illegal

offense of theft only a couple months after being placed on community control for her felony nonsupport conviction. We overrule Johnson's first assignment of error.

B. Best Evidence Rule

{¶18} In her second assignment of error Johnson contends that the trial court erred by permitting the state to present testimony describing the content of the videotape without producing it.

{¶19} It is a well-established rule that " 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' " *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Claims that are not timely raised on appeal are forfeited, absent plain error. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15-16.

{¶20} By not objecting at the revocation hearing to the admission of Sgt. Smith's testimony about the videotape Johnson forfeited her claim on appeal, except for plain error. *See, e.g., State v. Jones*, 4th Dist. Highland No. 04CA9, 2005-Ohio-768, ¶ 26 (defendant waived claim that admission of evidence violated the best evidence rule in Evid.R. 1002 by failing to raise issue in the trial court); *State v. Spires*, 7th Dist. Noble No. 04 NO 317, 2005-Ohio-4471, ¶ 62 (lack of objection at trial that neither the original nor the duplicate of tape recordings was introduced into evidence, thus violating Evid.R. 1002 and 1003, when it could have been cured, waived the issue on appeal, and plain error was not apparent).

{¶21} Johnson claims that the trial court's admission of Sgt. Smith's testimony about the videotape constituted plain error because it violated Evid.R. 1002 and the state failed to establish one of the exceptions specified in Evid.R. 1004. Evid.R. 1002 provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." Although commonly referred to as the "best evidence" rule, "a more apt description of the rule is the 'original writing' rule" because it applies only to writings, recordings, and photographs, and only when a party seeks to prove their contents; there is no general rule requiring the "best evidence." *See, generally,* 2 Giannelli, *Baldwin's Ohio Practice Evidence*, Section 1002.3 (3d Ed.2014).

{¶22} To establish plain error Johnson must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *see also State v. Lawson*, 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 15. Even if a defendant establishes plain error, Crim.R. 52(B) states only that a reviewing court "may" notice plain forfeited errors, so a court is not obliged to correct them. *Barnes* at 27; *Dublin v. Streb*, 10th Dist. Franklin No. 07AP-995, 2008-Ohio-3766, ¶ 47. Instead, appellate courts take notice of plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a [manifest] miscarriage of justice.' " *Mammone* at ¶ 69, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶23} We conclude that Johnson has not established error and that even assuming arguendo she did, this case does not present exceptional circumstances requiring a reversal to prevent a manifest miscarriage of justice.

{¶24} First, "[p]robation-revocation hearings are not subject to the rules of evidence and thus allow for the admission of [otherwise inadmissible] evidence." *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 21 (6th Dist.); *State v. Estep*, 4th Dist. Gallia No. 03CA22, 2004-Ohio-1747, ¶ 6 ("The Rules of Evidence do not apply to community control revocation hearings"); Evid.R. 101(C)(3) ("These rules do not apply in * * * [p]roceedings granting or revoking probation [and] proceedings with respect to community control sanctions * * *"); 1 Giannelli, *Baldwin's Ohio Practice Evidence*, Section 101.11 (3d Ed.2014) ("Rule 101(C)(3) exempts from the Rules of Evidence a number of criminal proceedings, including those involving sentencing, probation, and community control sanctions"); *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 16 (recognizing "no meaningful distinction between community control and probation"). "The rationale for this exception is that a trial court should be able to consider any reliable and relevant evidence indicating whether the probationer has violated the terms of probation, since a probation or community control revocation hearing is an informal proceeding, not a criminal trial." *State v. Gullet*, 5th Dist. Muskingum No. CT2006-0010, 2006-Ohio-6564, ¶ 27, citing *Columbus v. Bickel*, 77 Ohio App.3d 26, 36, 601 N.E.2d 61 (10th Dist. 1991). Because Johnson's argument on appeal is limited to a violation of Rules of Evidence that are inapplicable to her revocation proceeding, she cannot establish error, much less plain error.

{¶25} Second, although Johnson cites the Fifth and Fourteenth Amendments in her assignment of error, she does not specifically argue that the admission of Sgt. Smith's testimony about the videotape violated her due process rights in the revocation hearing, i.e., she does not claim that it restricted her ability to confront and cross-examine Sgt. Smith about his testimony. *McCants*, 1st Dist. Hamilton No. C-120725, ¶ 14 ("Although the rules of evidence are inapplicable to revocation hearings, the admission of hearsay may implicate the defendant's right to confront and cross-examine witnesses"); *Ohly* at ¶ 21 (in a probation-revocation case in which the defendant specifically argued that his due-process rights were violated, the court held that "[t]he introduction of hearsay evidence into a probation-revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation"); *see also* Markus and Dickinson, *Ohio Trial Practice*, Section 4:43 (2014) ("Consideration of letters, affidavits, and other materials that would be inadmissible at a trial does not deny due process at a probation violation hearing"). However, it is not our duty to create an argument where none is made. *See State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 34; *see also Prokos v. Hines*, 4th Dist. Athens Nos. 10CA51 and 10CA57, 2014-Ohio-1415, ¶ 56.[2]

{¶26} Third, it is not clear that the outcome of the revocation proceeding would have been different if Johnson had raised a timely objection to Sgt. Smith's testimony. The state could have then either sought to admit the videotape or assert an exception to Evid.R. 1002. In the alternative, the court could have relied on the photographs of the

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[2] By so holding, we are not condoning the admission of the contents of the videotape through Sgt. Smith's testimony. There are circumstances in which this practice may violate a probationer's right to due process, where that claim is properly raised and argued. *See, e.g., State v. Colvin*, 10th Dist. Franklin No. 92AP-1256, 1993 WL 128190 (Apr. 22, 1993).

theft incident, which Smith relied on in addition to the videotape, in identifying Johnson and Frederick as the perpetrators of the crime. Johnson does not contest Sgt. Smith's testimony about the photographs in this appeal.

{¶27} Fourth, the primary case relied on by Johnson—*In re J.S.*, 8th Dist. Cuyahoga No. 92504, 2009-Ohio-3470—is distinguishable. That case involved an appeal from an adjudication of delinquency—not a revocation proceeding where the Rules of Evidence do not apply. And the appellant in J.S. properly objected to the trial court's denial of his request to exclude any reference to a videotape that the court relied on, so a claim of plain error was not involved.

{¶28} Because Johnson has not established plain error or exceptional circumstances that require a reversal to avoid a manifest miscarriage of justice, we overrule her second assignment of error.

C. Ineffective Assistance of Counsel

{¶29} In her third assignment of error Johnson argues that her trial counsel provided ineffective assistance of counsel by failing to object to Sgt. Smith's testimony regarding the videotape. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, 2014 WL 346691, ¶ 23. The defendant bears the burden of proof because in

Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 23. Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶30} Based on our disposition of her second assignment of error, Johnson cannot establish that her trial counsel was ineffective for failing to raise an objection based on an evidentiary rule that was inapplicable to her revocation proceeding. *See State v. Wallace*, 7th Dist. Mahoning No. 05 MA 172, 2007-Ohio-3184, ¶ 22 (court reasoned that appointed appellate counsel likely failed to raise claim challenging a state witness's testimony about suspensions and license status based on hearsay because a probation-revocation hearing was not a formal trial and the parties were not bound by the Rules of Evidence).

{¶31} In addition, Johnson's trial counsel could have reasonably adopted the trial strategy to accept Sgt. Smith's testimony about the videotape because the introduction of the actual recording may have more vividly confirmed Johnson's culpability. *See State v. Keenan*, 81 Ohio St.3d 133, 152, 689 N.E.2d 929 (1998), holding that the failure of defense counsel in a murder prosecution to object to testimony by two of the state's witnesses concerning letters that the defendant had written to them, and to request that state be required to introduce actual letters, did not constitute ineffective assistance. Although such objection would have had merit under "best evidence" rule, defense counsel could reasonably conclude that the testimony would be less damaging than the letters, which would follow the jurors into the jury room as exhibits. Because Johnson has not rebutted the presumed competence of her trial

counsel in failing to object to Sgt. Smith's testimony about the videotape, we overrule her third assignment of error.

IV. CONCLUSION

{¶32} Johnson has not established that the trial court committed reversible error in finding that she violated her community control, revoking it, and sentencing her to prison. We affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Judgment Only.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.